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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GLENN EDWARD MAYS, JR., Defendant and Appellant.	E047366 (Super.Ct.No. RIF134224) **OPINION**

APPEAL from the Superior Court of Riverside County. Craig Riemer, Judge. Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury found defendant Glenn Edward Mays, Jr., guilty of robbery (Pen. Code, § 211)[1] with the personal use of a firearm (§ 12022.53, subd. (b)) (count 1); two counts of possession of a firearm by a felon (§ 12021, subd. (a)) (counts 2 and 6); and carjacking (§ 215, subd. (a)) (count 5) with the personal use of a firearm (§ 12022.53, subd. (b)).[2] Defendant thereafter admitted that he had suffered one prior serious felony conviction (§ 667, subd. (a)), one prior strike conviction (§ 667, subds. (c) & (e)(1)), and two prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to a total term of 32 years 4 months in state prison: 10 years for the carjacking plus an additional 10 years for the gun-use enhancement attached to that count; two years for the robbery with an additional three years four months for the gun-use enhancement attached to that count; one year each for the two prison priors; and five years for the prior serious felony conviction; sentence on counts 2 and 6 were stayed pursuant to section 654. Defendant appeals from the judgment, essentially challengingthe representation he received, the sentence, and the sufficiency of the evidence as to the carjacking. For the reasons explained below, we reject defendant's contentions and affirm the judgment.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The jury found defendant not guilty of counts 3, vehicle theft (Veh. Code, § 10851, subd. (a)), and 4, receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)). In addition, count 7, evading a peace officer (Pen. Code, § 2800.2), was dismissed after the jury was unable to reach a unanimous verdict on that count, and count 8, vehicle theft (Veh. Code, § 10851, subd. (a)), was dismissed in the interests of justice pursuant to Penal Code section 1385.

I

FACTUAL BACKGROUND

A. *December 26, 2006, Incident*

On December 26, 2006, Jose Huerta was working on his truck outside of his garage with a light bulb hanging from the hood of the truck when he noticed a minivan drive slowly past his house with its lights off. Minutes later, defendant (who was wearing a bandana over his face, which slipped down during the incident) appeared next to the driver's side of Huerta's truck and pointed a gun at Huerta, demanding Huerta's wallet. Huerta gave him his wallet and started walking toward his house, fearing for his life. Defendant eventually fled and got into the minivan. Another person was waiting for defendant in or near the minivan. Huerta's wife saw the incident from the living room window and called the police.

Huerta identified defendant as the perpetrator in a photographic lineup as well as at trial. At trial, Huerta admitted that he began using methamphetamine around December 2006 but stated that he was not under the influence during the incident. Huerta also acknowledged that he had sustained a prior conviction for possession of methamphetamine in 2007. He further stated that at the time of trial he was in custody with criminal drug charges pending against him.

Jennifer Worthington testified that she was with defendant in the minivan on the night of the incident and that they had stopped at Huerta's house.[3] She recalled that

[3] Worthington knew Huerta as "Chuy."

defendant had gotten out of the van and had gone into Huerta's yard but returned a few minutes later. When they drove off, with defendant driving, defendant handed Worthington a wallet with Huerta's identification inside. Worthington knew that defendant usually carried a small black gun with a wooden handle, the same type as described by Huerta. However, she did not know if defendant had carried the gun on the night of the incident.

A police detective interview of Worthington was played for the jury. In relevant part, Worthington had informed the detective that she knew defendant had a gun on the night of the incident and that she had heard defendant tell other people that he had "jacked [Huerta]" or "jacked this wallet."

B. *January 1, 2007, Incident*

On January 1, 2007, 14-year-old Alfredo E. was riding his all-terrain vehicle (ATV) with his cousin behind his uncle's home when a blue truck drove by. The driver, who was wearing a bandana over his face, pointed a gun at Alfredo. The man demanded that Alfredo put the ATV in the back of his truck. Alfredo was unable to do so by himself, so the man helped Alfredo lift the ATV into the truck. In doing so, the man had briefly taken off his bandana and Alfredo had been able to see his face.

Alfredo's cousin saw the entire incident. Police were notified and given the license plate of the truck.

Alfredo identified defendant from a photographic lineup. He also identified defendant as the robber in at the time of trial. Alfredo described the gun as being small and black with a wooden handle.

The blue truck was later found, abandoned in a wash in the desert. Alfredo identified the truck as the one driven by defendant during the incident.

Worthington informed the detective that defendant had said he had a truck and an ATV and had asked Worthington if she knew anyone who wanted to buy the ATV.

Defendant was eventually apprehended by police on January 9, 2007, following a pursuit with police.

II

DISCUSSION

Defendant appealed, and upon his request this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] setting forth a statement of the case, a summary of the facts, and potential arguable issues and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In his supplemental briefs, defendant essentially claims (1) his trial counsel was ineffective in cross-examining the prosecution's witnesses; (2) his trial counsel was ineffective in discrediting the witnesses' identification of him in both incidents; (3) the trial court erred in its sentencing scheme; (4) the trial court or his

counsel erred with regard to a reasonable doubt instruction "or lack thereof"; and (5) the eyewitness identification evidence was insufficient to support his conviction of carjacking.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

We reject defendant's first claim of error that his counsel was repeatedly ineffective. To establish ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that the deficiencies prejudiced his defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [104 S.CT. 2052, 80 L.Ed.2d 674].) A conviction will be reversed only if there could be no conceivable reason for counsel's acts or omissions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Tactical errors are generally not reversible, and defense counsel's tactical decisions should be evaluated in the context of available facts, not in the """harsh light of hindsight."""" (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland*, at p. 697.) Prejudice is shown when there is a reasonable probability that the defendant would have obtained a more favorable outcome absent counsel's alleged deficiency. (*Strickland*, *supra*, at p. 697.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Stanley* (2006) 39 Cal.4th 913, 965.)

Defendant has met neither of the requirements of *Strickland*. There is no evidence that his counsel's performance was deficient, nor can defendant demonstrate that any alleged deficiencies caused him prejudice. The record shows that trial counsel adequately cross-examined the prosecution's witnesses in an attempt to discredit their testimonies or identification of defendant as the perpetrator in both incidents. In fact, trial counsel in an attempt to discredit Huerta's testimony highlighted Huerta's use of methamphetamine as well as Huerta's involvement in the criminal justice system. Counsel also attempted to discredit the witnesses' identification of defendant by highlighting the lighting conditions and use of a bandana to cover defendant's face. Indeed, due to counsel's competency, the jury found defendant not guilty of the vehicle theft count and was unable to reach a verdict as to the evading count. Moreover, even if we assume, for the sake of argument, that trial counsel was ineffective for the reasons alleged by defendant, defendant cannot show prejudice. The witnesses unequivocally identified defendant as the perpetrator in the incidents. The gun used by defendant was also identified by both the robbery victims. In sum, defendant cannot show he would have obtained a more favorable verdict absent any alleged deficiencies by trial counsel.

We also reject defendant's claim that the trial court erred in sentencing him. The record indicates the trial court properly sentenced defendant as required by the law. (See §§ 211, 215, subd. (a), 654, 667.5, subd. (b), 667, subds. (a), (c) & (e), 12022.53, subd. (b).)

Furthermore, contrary to defendant's claim, the trial court adequately instructed the jury on the reasonable doubt instruction. Prior to trial, the trial court stated, "I will now summarize the presumption of innocence and the People's burden of proof. [¶] . . . [¶] A defendant in a criminal case is presumed to be inncodent. This presumption requires that the People prove each element of a crime and any special allegation beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an aiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt." Moreover, prior to deliberation, the trial court again instructed the jury with the reasonable doubt instruction pursuant to Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 220.

Appellate courts have consistently held that CALCRIM No. 220 is an accurate statement of the reasonable doubt standard. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 601 [holding CALJIC No. 2.90, predecessor to and substantially similar to CALCRIM No. 220, constitutional]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1239; *People v. Rios* (2007) 151 Cal.App.4th 1154, 1156-1159; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1508-1509; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1092-1093.)

Finally, we find no merit to defendant's claim that there was insufficient evidence identifying him in the carjacking committed on January 1, 2007. Specifically, defendant maintains that the "only logical deduction" from the then-14-year-old victim's testimony is that the victim was "coached" by the prosecution in identifying defendant and that his testimony identifying defendant was unreasonable.

It is fundamental that evidence is "substantial" where, upon review of the entire record, it is found to be reasonable, credible, and of solid value. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) "In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) " . . . '"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.'"" (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.)

Here, as in *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497, "'there is in the record the inescapable fact of in court eyewitness identification. That alone is sufficient to sustain the conviction.' [Citation.] Next, when the circumstances surrounding the

identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court. [Citation.] Third, the evidence of a single witness is sufficient for proof of any fact. [Citations.]" Further, "[n]o inherent improbability appears in the identification testimony of [the witness], and nothing about the evidence shows the [crime] would have been physically impossible for defendant to perpetrate." (*People v. Young* (2005) 34 Cal.4th 1149,1181.)

We have now concluded our independent review of the record and find no arguable issues.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
Acting P.J.

We concur:

GAUT
J.

KING
J.